In the

Supreme Court of the United States

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. OF L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

BRIEF OF WISCONSIN EMPLOYMENT RELATIONS BOARD IN REPLY TO BRIEF OF NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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Although the above entitled matter was decided February 28 and the extended period for filing petition for rehearing expired on March 30th, the brief of the National Labor Relations Board, amicus curiae, was not served upon the respondents until April 14; and so this respondent's brief in opposition to the petition for rehearing, which was filed on April 7, could contain no comment on the conten-

tions of amicus curiae. This respondent does not object to consideration of the brief amicus on the ground of delayed filing, but asks permission of the court to reply only to the extent necessary to comment upon the significance —or lack of significance—of the arguments at this stage of the proceeding.

Most of the 62-page brief of the National Board is a detailed repetition of matters finally submitted to the court on November 17 and 18 after the filing of exhaustive briefs, and we will not endeavor to reargue those matters.

The entire brief of amicus curiae is based upon the premise that Congress did *not* intend what this court determined that it *did* intend. We believe that this court gauged the Congressional intent correctly; but even if it had not, Congress could readily have corrected any misinterpretation of its intent since February 28, when the decision was published. Its failure to take such action must reflect its satisfaction with the court's analysis.

The argument of amicus curiae is based upon the premise that the text of the law itself is ambiguous so that resort to extraneous considerations must be had in aid of construction. For that purpose amicus curiae has discussed legislative history, committee reports, and even legislative arguments, the consideration of which is permissible only if Congress failed to make its intent clear in the law itself. If extraneous considerations are permissible on that ground, surely the most persuasive of extraneous circumstances is the apparent satisfaction of Congress with the court's decision as evidenced by its failure to reject it legislatively.

If the decision does not accord fully with the intent and the wishes of Congress, the simplest and surest way

of clarifying the question would be by amendment, instead of throwing back into uncertainty, for prolonged additional consideration, issues which have been resolved for a sufficient length of time that persons most affected have incorporated them into their programs.

It has been suggested that the decision here involved might interfere with the right of the National Board to determine whether an unfair practice existed under sec. 8 (b) 1 of the Labor Management Relations Act, 1947, relating to coercion of employees. That element is not involved in the decision because the challenged portion of the state board's order had nothing to do with coercion of employees.*

The suggestion is also made that the decision might interfere with the National Board's power under sec. 8 (b) 3 of the National Act to enjoin refusals of a union to bargain. This is based on the passing comment by the court that the employer was not informed of any specific demands which the coercive tactics were designed to enforce. Such statement by the court (which, incidentally, has been challenged by the petitioners) was one incident only in the description of a total plan, and nowhere in the court's decision was there an indication that the decision was premised on that circumstance as the deciding factor. In any event, there could be nothing inconsistent between the state's prohibition against the larger program of tortious conduct, of which the failure to make specific

*Such a question was before the state board, and an order was issued prohibiting intimidation of employees to join in a coercive program against their will; but that provision was not attacked, whether because the petitioner believed it moot because it was issued before the Labor Management Relations Act, 1947, was enacted, or for some other reason is not shown.

demands was a mere incident, and either a requirement that the union bargain or a finding that it had not failed to do so based on the latter element.

It was suggested at page 51 of the brief amicus curiae that the problem here involved differs from the tortious conduct under consideration in the *Sands* case*, where the court decided that concerted action in repudiation of a contract is beyond the protection accorded by federal legislation. The instant case is exactly that, one in which the coercive conduct consisted of inducing employees to repudiate their contract obligations without relinquishing the benefits of the contracts.

To carry to its logical conclusion the argument that *any conduct*, which might be involved in the National Board's consideration of whether an unfair practice has been committed, is immune from police regulation would make impossible, for instance, state regulation against mass picketing in a manner to obstruct entrances to public buildings, because such picketing might be found under sec. 8 (b) 1 of the national act to constitute the unfair practice of coercing employees. We do not believe that Congress intended to prevent states from taking protective action against tortious conduct, which has not itself been defined as an unfair practice, merely because such tortious conduct might be considered as an element in connection with charges of unfair practice on a different ground.

Amicus curiae also challenges the decision of this court on the ground that the court had no power to determine what the law meant without the National Board first hav-

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*National Labor Relations Bd. v. Sands Mfg. Co., (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508.

ing made its determination.* We believe it to be settled that the proper interpretation of law is a legal question; and that legal questions may be determined by the judiciary whenever that is necessary to a determination of the rights of parties in a real controversy coming before it. To say that courts might not determine legal questions in such cases would be not only an innovation, but an infringement upon the judicial power. We do not believe that Congress intended to try to deprive this court of its power to determine legal questions, when necessary to the proper disposition of a case before it, and to transfer such inherently judicial power to an administrative agency.

In dozens of cases before this court and circuit courts of appeals (many of which were considered in arriving at the decision issued in this case on February 28) the court's decision that certain types of concerted activities are beyond the scope of federal legislation, and so beyond the power of the National Board to render immune, were made where the National Board had not only issued orders to the contrary but presented its contentions vigorously as a party litigant in support of the orders. If the courts may interpret the statute contrary to orders and contentions of the National Board, surely it may define a rule of law where the board has made no contrary order. To do so does not "atrophy" the jurisdiction of the National Board, because all administrative agencies are necessarily limited by the scope of the statute as interpreted judicially. When the highest tribunal in the land has stated as a rule of law what the statute means, all administrative agencies are to

*See page 36 of the brief amicus curiae where it is stated that the court's decision results in "transferring" the function from the National Board to this court.

be guided by that rule. This is not a usurpation of administrative jurisdiction but the exercise of a function traditionally judicial.

Amicus curiae argues that all concerted activity of the type involved in the *Fansteel** and *Sands** cases is now made immune from state police power by the Labor Management Relations Act, 1947, no matter how tortious, and no matter what its impact on the local welfare. (See pages 51-52 of brief amicus curiae.) It is urged that the only remedial action allowed by Congress with respect to tortious concerted activity must be initiated by employer discipline. It is also urged that any other policy would result in 48 sets of rules. For the purpose of this brief, we will assume that 48 sets of rules would indeed be bad policy, although we cannot see how that fact would be decisive of the case if Congress chose to permit it. However, we do not think that is a proper evaluation of the result of the rule announced in this court's decision.

In the first place, having employer discipline as a necessary first step involves a far greater potential variation than 48 sets of rules. There are thousands, or perhaps millions, of employers in the country, each of whom establishes his own disciplinary policy. The cases in which he determines not to discipline would not reach the National Board at all, but would be settled wholly according to the policies of the employer. If he determined to discipline, the case might or might not reach the National Board according to the resources and pertinacity of the employees

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*National Labor Relations Board v. Fansteel M. Corp. (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490

National Labor Relations Bd. v. Sands Mfg. Co. (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508

affected. The number of potential variations in the rules affecting concerted conduct of employees would be unlimited if the standard established by the court were again removed.

If the decision remains in effect, it is a standard to be followed throughout the country, not only by states but by all other institutions and individuals.

So far as can be ascertained from the long and fairly successful history of our dual form of government, there have been very few, if any, cases in which there were 48 separate sets of rules for any situation. State courts follow precedent so that, on most subjects, rules of all the states tend to become uniform. Even where there is a variance, it is unusual that it cannot be divided into no more than two sets of rules: that is, one representing the majority and one representing the minority. When as definite a standard as has been laid down for the government of the states as has been done by this court, some small degree of variance and experimentation to meet variances in local need is surely not evil. When any renegade state tends to abuse the scope of the variance permitted, it may be forced into line. Employees are no more powerless against infringement of their rights by states (as suggested at page 37 of the brief amicus curiae) than they would be against any type of infringement. That is illustrated in the instant case.

The contention that Congress intended that the elimination of improper conduct must be left wholly to the employer's discipline and that for states to concern themselves is somehow reprehensible causes us some concern because of the implication that states are less worthy to be trusted with matters affecting the welfare of employees

than are employers. It is the states on whose behalf the Congress and the national administrative agencies act. Surely the principals whom the Congress and the federal agencies represent should not be discredited for motives less worthy than those of their employer subjects. We cannot believe that Congress so mistrusted the motives of state governments as to prefer to transfer their traditional police powers to a single group of subjects and so wholly to substitute vindictive partisan action for action on behalf of the public.

The great majority of states endeavor conscientiously to follow national principles and to respect the rights of their citizens; and in the few cases where they do not, the federal courts are capable of protecting the citizens.

We believe the court adopted a workable standard which has established a stable source of guidance since publication of its decision on February 28. That standard is known to Congress so that, if for any reason it were deemed undesirable, the standard could be repudiated simply and quickly, without throwing the whole question again into prolonged uncertainty.

Respectfully submitted,

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